No. 81-2182

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DEAN GANA, PETITIONER

v.

STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

THE LAW OFFICES OF
CHARLES L. GOLDBERG
303 West "A" Street
San Diego, CA 92101

CHARLES L. GOLDBERG
Attorney for Petitioner
DEAN GANA

QUESTION PRESENTED

Whether a state court has the jurisdiction to issue a search warrant for the search and seizure of a first class mail parcel in the possession and custody of United States Postal Officials at a United States Post Office.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DEAN GANA, PETITIONER [1]

v.

STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Charles L. Goldberg, on behalf of petitioner DEAN GANA, petitions for a

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1. Stephen G. McCully was a co-defendant and co-appellant, but is not petitioning for a writ of certiorari.

writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii in this case.

OPINION BELOW

The opinion of the Hawaii Supreme Court (Appendix A, infra, pages 1A to 20a) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on April 16, 1982, at 9:39 a.m., pursuant to the opinion dated March 24, 1982. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2 of the Constitution provides:

> This constitution, and the laws of the United States . . . shall be the supreme law.

Article I, Section 8, Clause 7 of the Constitution provides:

> The Congress shall have the power . . . to establish post offices and post roads.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 39, United States Code section 3623, subdivision (D) provides:

> The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation of mail by the postal service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer, or employee of the postal service for the sole purpose of determining an address at which the

letter can be delivered, or pursuant to the authorization of the addressee.

STATEMENT

This case involves the search and seizure by the Hawaii County police armed with a Hawaii County search warrant of a first class mail parcel in the possession of the United States Postal Officials at the Hilo Airport Post Office in Hawaii.

On February 2, 1978, an officer in the Vice Division of the Hawaii County Police Department contacted federal postal officials at the Hilo Airport Post Office seeking information regarding a post office box registered in the name of Steven G. McCully and any parcels recently mailed to his post office box. On February 6, 1978, after being informed of the presence of a first class parcel at the post office, the local police officer contacted a Hawaii State Court Judge and obtained a State search warrant for the parcel. There was no

cooperation by Federal Postal Inspectors in obtaining this Warrant. (See Appendix D).

After being served with the State search warrant on February 6, 1978, the postal officials relinquished the parcel into the custody of the local police officer. A search by the local police officer of the parcel uncovered a brown powder which was determined to be methamphetamine. The local officers then called a U.S. Postal Inspector and the package was then resealed and reinserted into the mail on February 6, 1978, by the postal inspector. On the afternoon of February 6, 1978, Steven McCully was observed picking up the parcel from the post office and taking it to his residence. Based upon this information, search warrants were obtained for the residence, vehicle, and person of Steven McCully.

Petitioner GANA and McCully were then indicted for attempting to promote and promoting dangerous drugs in violation of HRS sections 705-500, 712-1242, 712-1243, and 712-1241.

The Third Circuit Court granted Petitioner GANA's motion to suppress concluding that the State search warrant was invalid as a federal search warrant was required and should have been obtained to search and seize an item in the first class mail. The Court further concluded that this primary illegality tainted the subsequent searches and seizures. (See Appendix D). The Government appealed pursuant to Rule 37 of the Hawaii Rules of Penal Procedure and Chapter 602 and 641, H.R.S.

It is undisputed that the judge who issued the search warrant was acting in his capacity as a State Judge.

Additionally, it is undisputed that the first search and seizure of the first class mail parcel tainted all evidence subsequently obtained by the State police officers.

On appeal, the Supreme Court of the State of Hawaii ruled that the language in Title 39, United States Code section 3623(d) providing for the search of first class mail under "authority of a search warrant authorized by law" had been interpreted by the United States Postal Service as authorizing State Courts to issue search warrants for first class mail. The Court ruled that the inclusion of State search warrant under a statute requiring "search warrant authorized by law" was not palpably erroneous. (See Appendix A).

REASONS FOR GRANTING THE WRIT

1. CONFLICTS WITH UNITED STATES CONSTITUTION

The Supreme Court of Hawaii construes Title 39, United States Code, section 3623,

subdivision (d) as authorizing State Courts to issue State search warrants for the search and seizure of first class mail parcels. However, in arriving at this conclusion, the Hawaii Supreme Court inexplicably and completely ignores the United States constitutional question of whether the Supremacy Clause permits State interference with the federal postal system.

Presumably Article I, section 8, clause 7 of the United States Constitution confers upon the United States Congress the exclusive jurisdiction of establishing post offices and post roads. Pursuant to this authority Congress enacted Title 39 of the United States Code. Likewise, the United States Postal Service adopted federal regulations and procedures to govern the postal system. 2/

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2. Postal Service Manual 115.6 42 Fed.Reg. 18, 757 (April 8, 1977).

Despite the obvious federal character of the postal system, the State of Hawaii has self-proclaimed its right to search and seize first class mail parcels in exclusive custody of the United States Postal Officials.

Numerous courts have noted that the power of Congress to protect the mail is exclusive and embraces whatever measures are deemed necessary to insure the safe and speedy transit and prompt delivery of the mail and mail matter.[3/] In fact, once an item is deposited in the mail, it becomes in essence, property of the national Government and thus subject to the exclusive control of the Federal Government.

The self-conferred power of the State of Hawaii conflicts with this exclusive jurisdiction of Congress by allowing Hawaii to seize items from the

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3. United States v. Maxwell, 137 F.Supp., 298 (W.D. Mo. 1955);

mail. In McCulloch v. Maryland, 4 Wheaton 316 (1819), the United States Supreme Court held that the Supremacy Clause prohibits state interference with federal banking even where the State has concurrent jurisdiction. Here, the State of Hawaii is attempting to interfere with the exclusive jurisdiction of the United States Post Office, a much greater conflict prohibited by the Supremacy Clause.

The inevitable conflict which will result when a State Court attempts to enforce its warrants against a reluctant postal employee will clearly place a direct and substantial burden upon the postal system. This type of direct infringement is strictly prohibited by the Supremacy Clause of the United States Constitution and mandates a reversal of the Hawaii Court's ruling.

2. CONFLICTS WITH OTHER STATE RULINGS

The ruling of the Hawaii Supreme Court creates a conflict of law between the State of Hawaii and the State of California. The California Supreme Court in Ex Parte Phoedivius, 177 C. 238 (1918) previously ruled that a State Court does not have authority to issue a state search warrant for the search and seizure of the United States mails. Thus, this petition should be granted to resolve this important question of federal law.

3. UNAUTHORIZED CONTROL OVER POSTAL SYSTEM

The Hawaii Supreme Court interprets federal legislation as conferring powers upon the individual states which were not contemplated by Congress in enacting this specific provision. The Hawaii Supreme Court reasons that Congress intended Title 39 U.S.C. section 3623(d) as a delegation to the states of its exclusive jurisdiction over the mails.

There is absolutely no basis in law or in the legislative history of the statute for this conclusion. Title 39, section 3623, subdivision (d) was the replacement of the previous section 4057 of the same title enacted in 1960. That section utilized different language to require in essence that a search warrant authorized by law was a prerequisite to the opening of any first class mail.[4/]

Section 4057 was in turn, the compilation of numerous previous statutes enacted by Congress.

The legislative history of Title 39, section 4057 indicates that it was based

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4. Former Title 39, section 4057 provided:

> Only an employee opening dead mail by authority of the Post Master General, or a person holding a search warrant authorized by law may, open any letter or parcel at the first class which is in the custody of the Department.

on previous sections Title 18 U.S.C. section 1717(c) enacted June 25, 1948 and Title 39 U.S.C. sections 256, 259 and 732.[5/] Each of these sections contained provisions prohibiting the opening of letter mail other than by postal employees. The purpose of the Postal Reorganization Act of 1970 was clearly not to delegate the jurisdiction of Congress over the mails to individual states but was "to convert the Post Office Department into an independent establishment in the executive branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service."[6/]

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5. United States Congressional and Administrative News, 1960, Volume 1, page 917.

6. United States Congressional and Administrative News 1970, Page 3650.

In reviewing the legislative history and the terms of previous statutes, it is manifestly apparent that section 4057 and its progeny section 3623, subdivision (d) were not intended by Congress as a delegation of its exclusive jurisdiction to regulate the mails. The interpretation by Hawaii of this statute is contrary to the true intent of Congress and creates an unauthorized State power over the federal postal service.

4. ERRONEOUS RULE OF CONSTRUCTION

The standard of review adopted by the Supreme Court of Hawaii in construing this statute is ambiguous and inconsistent. The Hawaii Supreme Court reverses the Circuit Court decision by stating that the inclusion of state search warrant under a statute requiring search warrant authorized by law was not "palpably erroneous." (See Appendix "A" page 20a).

5. DISREGARDS FACTUAL FINDINGS OF TRIAL COURT

The Supreme Court of Hawaii concludes that the legal situation on February 2, 1978, with respect to the practice in the postal service was to honor search warrants issued by State Courts and served by state officers (see Appendix "A" page 16a). Without relying on the findings of facts by the Circuit Court Judge, the Hawaii Supreme Court, for the first time on appeal makes an independent finding of fact based on the brief testimony of Postal Inspector Ovelgonne. This finding is based on the brief testimony that in the six years that Ovelgonne had been a postal inspector in California, he participated in controlled deliveries approximately 25 times and about 90 percent of those deliveries involved state search warrants. Inspector Ovelgonne in fact testified that it was the usual procedure for the

controlled delivery of a mail parcel to go through the United States Postal Inspectors participating with federal officers and that after the postal authorities had delivered the package to the recipient, that a state search warrant would then be executed for the seizure of the parcel.

Not only does the Supreme Court of Hawaii attempt to make a factual finding based on meager testimony not even purporting to deal with the same issue of what the practice in the postal service was, but the finding of the Supreme Court is factually incorrect.

Inspection service directives to postal officials available to the inspective service personnel at the time of the search in the instant case stated that State warrants for mail should not be honored.[7/] These directives were

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7. Division Circular No. 14 dated June 13, 1977; Chief Inspector All Region

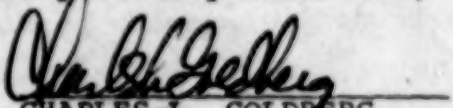
also in the opinion postal regulations on February 6, 1978, 39 CFR 211.1(A)(3) (1977). Thus, the Supreme Court of Hawaii's conclusion that the practice in the postal service was not only without legal basis, but was without factual basis. Accordingly, the decision of the Supreme Court of Hawaii and its attempt to base its conclusion that state search warrants were authorized pursuant to Title 39, section 3623, subdivision (d), and the practice in the postal service, must be overturned.

CONCLUSION

The petition for Writ of Certiorari should be granted.

DATED: 5-24-82

Respectfully submitted,



CHARLES L. GOLDBERG
Attorney for Petitioner
DEAN GANA

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7. - All Division Letter, Subject: State Search and Seizure Warrants Against Mail. (See Appendixes F and G).

APPENDIX A

IN THE SUPREME COURT OF

THE STATE OF HAWAII

OCTOBER TERM 1982

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STATE OF HAWAII, Plaintiff-Appellant,
v. STEPHEN G. McCULLY and
DEAN GANA, Defendants-Appellees

NO. 7759

APPEAL FROM THIRD CIRCUIT COURT

HONORABLE SHUNICHI KIMURA, JUDGE

CRIMINAL NO. 5580

MARCH 24, 1982

RICHARDSON, C.J., NAKAMURA, J., RETIRED JUSTICE MARUMOTO IN PLACE OF LUM, J., EXCUSED AND RETIRED JUSTICES OGATA AND MENOR, ASSIGNED BY REASON OF VACANCIES

STATUTES - construction.

Where an administrative agency is charged with the responsibility of carrying out the mandate of a statute

which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.

OPINION OF THE COURT BY MARUMOTO, J.

Defendants Stephen G. McCully and Dean Gana were indicted by the grand jury of the Third Circuit Court on April 27, 1978, the former on three counts, as follows:

> Count I: Attempting to promote dangerous drug in the second degree, in violation of HRS §§ 705-500 and 712-1242;
>
> Count II: Promoting detrimental drug in the second degree, in violation of HRS § 712-1248;
>
> COUNT III:Promoting dangerous drug in the third degree, in violation of HRS § 712-1243;

and the latter in one count as follows:

> Count IV: Attempting to promote dangerous drug in the first degree, in violation of HRS §§ 705-500 and 712-1241.

The drug involved in Counts I, III, and IV was methamphetamine, and the drug involved in Count II was marijuana.

Counts I, III, and IV were based on evidence found by the Police Department of the County of Hawaii upon search of first class United States mail parcel sent from San Diego, California, by Gana, addressed tc McCully at P.O. Box KTA 3616, Hilo, Hawaii, with a sticker pasted thereon showing McCully's new post office box at Hilo Airport Post Cffice, being P.O. Box 4461, Hilo, Hawaii 96720.

The search was made pursuant to search warrant issued by Mark Norman Olds, district judge of the Third Circuit, and served on

Arthur Aiwohi, postmaster of Hilo Airport Post Office.

Although it is not clearly shown in the record, Count II was presumably based on evidence found in the course of searches conducted under additional search warrants issued by Judge Olds after the discovery of methamphetamine in the search under the original warrant.

This case is here on appeal by the State of Hawaii from an order of the Third Circuit Court granting Gana's motion, joined in by McCully, for suppression of the evidence obtained by the Police Department upon search of the mail parcel sent by Gana to McCully.

Defendants sought suppression of the evidence on the following grounds:

(1) Search of the United States mail parcel in this case was unlawful because, for such purpose, a Federal search warrant was required,

and a State search warrant was invalid;

(2) State search warrants issued after the discovery of methamphetamine upon search conducted under the original search warrant were invalid inasmuch as they were tainted by the invalidity of the original search warrant;

(3) There were numerous violations of the United States postal regulations which made the search under the original search warrant illegal; and

(4) The affidavit in support of the original search warrant failed to state sufficient facts to support a finding of probable cause, and, even if such facts were stated, they were too remote in time and stale for the

issuance of the same.

The circuit court granted the motion for suppression solely on the first ground, stating in its order that "the evidence seized in the instant cause be suppressed since the state issued search warrant was invalid as a federal search warrant was required."

The second ground stands or falls depending on the validity of the first ground.

With reference to the third and fourth grounds, the circuit court stated in its conclusions of law as follows:

"3. The postal regulation violations in the instant cause do not call for the suppression of evidence"; and

"4. The information presented in the affidavit in support of the search warrant for the package in the custody of the United

States Postal Service at the Hilo Airport Post Office was not stale, and probable cause existed."

Rule 3(b)(3) of the rules of the court requires that the opening brief on appeal contain a short and concise statement of the question or questions presented for decision by this court, and provides that questions not so presented will be disregarded, although the court, at its option may notice plain error not presented.

Under Rule 3(c), appellee is required to include, in his answering brief, a counter-statement of questions presented for decision, unless he is satisfied with the statement of question in the opening brief.

On this appeal, the State of Hawaii stated the following question in its opening brief as the sole question for decision on this appeal:

Whether a state search warrant, issued for the investigation of a state criminal offense, is valid, when served on a postal official at a United States post office for the search and seizuire of a mail parcel.

Gana's statement of question in his answering brief is identical with that of the State of Hawaii, although couched in somewhat different language. So is the statement of question in McCully's answering brief.

Neither Gana nor McCully included the validity of the conclusions of law by the circuit court on the third and fourth grounds as question for decision by this court.

We cannot say that the conclusions of law of the circuit court on the third and fourth grounds are plain errors which this court may notice at its option.

Consequently, we limit our inquiry to the single question stated in the opening brief, namely, whether a State search warrant was valid for search and seizure of the first class mail parcel in this case when it was still in the custody of the United States post office.

We state below the facts in the record which are pertinent to this appeal.

January 20, 1978

Sergeant John De Sa, a police officer assigned to the vice division of the Police Department of the County of Hawaii, received information regarding McCully's possible criminal activities.

January 25, 1978

De Sa went to Hilo Airport Post Office to see the supervisor in charge. He was referred to Maile Mattos, a window service technician.

As window service technician, Mattos supervised the window personnel of the post office, and handled claims and inquiries.

De Sa identified himself to Mattos as a police officer by showing his badge. He then informed Mattos that the Police Department suspected that drugs would be sent from San Diego by mail addressed to McCully, and inquired whether McCully had a post office box at Hilo Airport Post Office. At that time, De Sa knew that McCully previously had a box at KTA Post Office in Hilo.

Mattos checked the files of Hilo Airport Post Office; informed De Sa that McCully had a post office box there; and furnished him the number of McCully's box at that post office, as well as the number of the box McCully previously had at KTA Post Office.

Mattos furnished the information requested by De Sa because she had previously been instructed by her superiors to cooperate with law enforcement officers when they came in with specific requests.

February 2, 1978

Mattos contacted De Sa by telephone, and informed him that a parcel from San Diego addressed to McCully had arrived. She also told De Sa that someone had placed a parcel pick-up notice in McCully's box, and when McCully came for the parcel, she stated to McCully that the notice was put in his box by mistake and there was no parcel for him.

Upon receiving the telephone call, De Sa went to the post office, and the following transpired:

(a) De Sa met Mattos, who referred him to Aiwohi, the postmaster, inasmuch as the parcel was sent as first class mail and was not addressed to De Sa.

(b) Upon entering Aiwohi's office, De Sa saw the parcel on a table there. With Aiwohi's permission, De Sa took a photograph of the outside of the parcel, and copied the addresses thereon. However, Aiwohi did not permit De Sa to take possession of the parcel or examine its contents. Aiwohi told De Sa that he had been in contact with Mike Triworgy, a postal inspector in Honolulu; that Triworgy advised him not to release the parcel except upon service of a search warrant; and that, if De Sa wanted further information, he should contact Triworgy.

(c) De Sa telephoned Triworgy, who confirmed the requirement regarding a search warrant. However, Triworgy did not tell De Sa that the warrant should be a Federal search warrant. Triworgy also told De Sa that, after taking possession of the parcel and examining its contents, he should hold the parcel

without resealing it, pending the arrival of a postal inspector from Honolulu, because only postal inspectors were authorized to reseal the parcel and put it back in the mail.

(d) After his conversation with Aiwohi and Triworgy, De Sa obtained a search warrant from Judge Olds, served the same on Aiwohi, and sent a copy to the postal inspectors' office in Honolulu.

(e) Aiwohi delivered the parcel to De Sa upon receiving the search warrant. De Sa then took the parcel to the Police Department, where he opened it and found one glass bottle containing 40 packets of brown powder. Test of the brown powder disclosed that it was methamphetamine. Thereafter De Sa kept the parcel and its contents in the Police Department until the arrival of a postal inspector from Honolulu.

February 6, 1978

Steve Ovelgonne, a postal inspector in Honolulu, went to Hilo. There he met De Sa, and accepted the parcel for resealing and reinsertion in the mail.

The facts stated above show that De Sa obtained the evidence in question with the full cooperation of officials of the United States Postal Service and by following the instructions which he received from them.

Validity of a search warrant is determined as of the date it is issued and executed. United States v. Doe, 19 F.R.D. 1 (U.S. D.C. E.D. Tenn. 1956).
Consequently, we will resolve the question at hand in accordance with the legal situation which existed on February 2, 1978, when De Sa obtained the search warrant from Judge Olds and executed it on Aiwohi.

The legal situation on February 2, 1978, with respect to search of first class mail in the custody of Postal Service was as follows:

(a) United States Code, Title 39, § 3623(d), provided that no first class mail of domestic origin shall be opened except under authority of a search warrant authorized by law. That provision was enacted in Public Law No. 91-375 on August 12, 1970.

(b) Previously, 39 U.S.C. § 4057, which was enacted in Public Law No. 86-682, on September 2, 1960, had provided that only a person holding a search warrant authorized by law may open any letter or parcel of first class which was in the custody of the Post Office Department.

(c) There was no Federal court decision which construed the words "search warrant authorized by law," as used in the statutes mentioned above, as requiring a Federal search warrant to the ex-

clusion of a search warrant issued by a State court.

(d) Postal Service had not taken final action on proposed rules regarding mail security, which was published in Federal Register, Volume 42, pages 18754-18758, on April 8, 1977. The proposed rules contained a provision in Section 115.61, which read as follows:

> No employee shall permit the execution of a search warrant issued by a State court and served by a State officer. If in doubt, an employee should temporarily detain the mail in question and promptly call a postal inspector for guidance.

(e) The practice in Postal Service was to honor search warrants issued by State courts and served by State officers.

At the circuit court hearing on the motion to suppress, Gana's attorney introduced the following documents which were admitted in evidence:

Exhibit B: United States Postal

Service - Mail Security Regulations - Final Rule - published in Federal Register, Volume 43, pages 14308-14314, on April 5, 1978 - Effective date, May 5, 1978;

Exhibit C: General Information Postal Service - Mail Security - Post Office Services (Domestic) TL 44-8-21-78.

Final rule adopted in Exhibit B incorporated the provision of Section 115.61 quoted above. Exhibit C is a portion of Postal Manual which incorporated the final rule adopted in Exhibit B.

Both Exhibit B and Exhibit C are not material to the decision in this case because they were not in existence when De Sa obtained the search warrant from Judge Olds and served it on Aiwohi, pursuant to the instruction which he received from Triworgy.

Evidence regarding the practice of Postal Service, before the adoption of Exhibit B,

to honor search warrants issued by State courts and served by State officers is contained in the testimony of Ovelgonne, who was called by Gana's attorney as a witness at the hearing on the motion to suppress. Ovelgonne's testimony was as follows:

(a) He had been a postal inspector in California since March 1972 and in Hawaii since January 1978.

(b) On February 2, 1978, and prior thereto, post offices in California honored State search warrants.

(c) On February 2, 1978, when Triworgy had a telephone conversation with De Sa, he did not specify Federal search warrant because, at that time, the law department of Postal Service had stated that new instructions were forthcoming, but they were not issued until after that date.

(d) In the six years he had been a postal inspector in California, he participated in controlled deliveries

approximately twenty-five times and about ninety percent of those deliveries involved State search warrants.

In Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Haw. 222, 242-43, 624 P.2d 1353, 1368 (1981), we stated:

> It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.

That statement is supported in Udall v. Tallman, 380 U.S. 1, 16 (1965), in which it is stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by officers or agency charged with its administration.

Here, we think that the inclusion of State search warrant under a statute requiring ' search warrant authorized by

law" was not palpably erroneous.

Reversed.

Jay T. Kimura, Deputy
Prosecuting Attorney,
County of Hawaii, for
Plaintiff-appellant.

Charles L. Goldberg (Goldberg
& Link of Counsel) for
defendant-appellee Gana.

Keith M. Kiuchi and Daphne
Barbee, Deputy Public
Defenders, for Defendant-
appellee McCully.

/s/ William Richardson

/s/ Edward H. Nakamura

/s/ Retired Justice Marumoto

/s/ Thomas S. Ogata

/s/ Benjamine Menor

APPENDIX B

NO. 7759

IN THE SUPREME COURT OF

THE STATE OF HAWAII

OCTOBER TERM 1981

STATE OF HAWAII,	)
	)CRIMINAL NO.5580
Plaintiff-Appellant,	)
	)APPEAL FROM ORDER
vs.	)FILED FEBRUARY 13,
	)1980
STEPHEN G. McCULLY and	)
DEAN GANA,	)THIRD CIRCUIT COURT
	)
Defendants-Appellees.	)HONORABLE SHUNICHI
	)KIMURA, JUDGE

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed on March 24, 1982, the Judgment of the lower court is reversed.

Dated: Honolulu, Hawaii, April 16,1982.

By the Court:

/s/ Darrell N. Phillips
CLERK

APPROVED:

/s/
Justice

APPENDIX C

SEARCH WARRANT No. 78-63

COUNTY AND STATE OF HAWAII

SEARCH WARRANT

To the Chief of Police of the County of Hawaii, his Deputy, or any Police Officer in the County of Hawaii, State of Hawaii, or any Police Officer in the State of Hawaii authorized by law to execute this warrant at the place designated hereinafter.

Affidavit(s) having been made before me that the property described hereinafter may be found at the locations set forth herein and that it falls within the grounds specified by said affidavit(s).

And as I am satisfied that there is probable cause to believe that the property described herein is being concealed on the premises or person described below and that the foregoing grounds for application for issuance of the search warrant

exist.

YOU ARE COMMANDED forthwith to SEARCH: A first class U.S. mail parcel, approximately 6"x6"x6" in size, wrapped in brown paper with gray tape around its sides, addressed to STEVE McCULLY, P.O. Box KTA 3616, Hilo, Hawaii, with an additional sticker indicating new post office box of McCULLY being P.O. Box 4461, Hilo, Hawaii, 96720, return address being D. GANA, 3926 58th, San Diego, 922115, and now being kept at the Hilo Airport Post Office;

for the following property:

1. Methamphetamine;

giving to the person from whom or from whose premises the property was taken a copy of this warrant and a receipt at the place from which the property was taken, and to seize it if found there, and prepare a written inventory of the property seized and return this warrant and inventory before me within ten days of this date,

as required by law.

This warrant shall be executed at the time indicated below by an "x".

__x__ only during the period of time between 7:01 A.M. until 9:59 P.M.

Dated: Hilo, Hawaii, February 2, 1978.

MARK OLDS
JUDGE
District Court of the
Third Circuit

SEARCH WARRANT No. 78-63

COUNTY AND STATE OF HAWAII

AFFIDAVIT FOR SEARCH WARRANT

On the basis of your affiant's personal knowledge, as set forth in the attachments hereto, and on the basis of the information contained in those attachments, SERGEANT JOHN R. DE SA, police officer, employed by the County of Hawaii, being duly sworn, deposes and says, that there is probable cause to believe that the property described hereinafter can be found at the location described hereinafter and that it falls within those grounds indicated by "x"(s), in that it is:

__x__ property that constitutes evidence of the commission of the offense of PROMOTING DANGEROUS DRUG, Section 712-1243 of the Hawaii Revised Statutes, as amended.

__x__ contraband by violation of Section 712-1243 of the Hawaii Revised Statutes, as amended.

and requests the issuance of a search warrant to SEARCH:

A first class U.S. mail parcel, approximately 6"x6"x6" in size, wrapped in brown paper with gray tape around its sides, addressed to STEVE McCULLY, P.O. Box KTA 3616, Hilo, Hawaii, with an additional sticker indicating new post office box of McCULLY being P.O. Box 4461, Hilo, Hawaii, 96720, return address being D. GANA, 3926 58th, San Diego, 922115, and now being kept at the Hilo Airport Post Office; for the following property:

1. Methamphetamine;

The following attachments are incorporated by reference as though set forth herein haec verba: Attachment(s) No(s). 3, pp 1 to 3;

WHEREFORE, it is prayed that a search warrant be issued and that such warrant authorize its execution: __x__ only between 7:01 A.M. and 9:59 P.M.; at any time of

day or night.

Dated: Hilo, Hawaii,

February 2, 1978.

JOHN R. DE SA /s/
AFFIANT

SERGEANT
OFFICIAL TITLE

Subscribed and sworn to before
me this 2nd day of February,
1978, at 4:05 o'clock p.m.

MARK OLDS /s/
JUDGE
District Court of the Third
Circuit

RELIABLE INFORMANT

Your affiant, a police officer employed by the County of Hawaii, received information from an informant who has previously given truthful information to affiant.

The name of the informant is N/A

Your affiant wishes to keep the identity of the informant confidential for the following reason(s):

The disclosure of the informant would tend to impair the said informant's future usefulness and effectiveness to law enforcement officers engaged in the investigation and uncovering of criminal activities and said informant fears for his life and safety if his identity is revealed;

Your affiant believes the informant to be a reliable person because:

He has given reliable information on at least four occasions which has

resulted in the arrests of at least three persons and the convictions of at least two persons for possession of drugs; that he has given other criminal information which has proved to be accurate upon independent verification; that the last information received by him was within the last two months;

Your affiant was informed by the said informant that he observed (heard) the following facts:

That on January 20, 1978, during the evening hours, your affiant personally met with the said informant who stated that he personally purchased speed from a STEVE McCULLY on at least one occasion and that he did take the drug by inhaling it; that said informant has taken speed before and the effects of the speed purchased from McCULLY had the same effect; that he was also informed by McCULLY that McCULLY's speed comes from San Diego

through the mail; that said informant told your affiant that he did approach McCULLY to purchase more speed on another occasion at which time he was informed that McCULLY did not have any and was expecting a shipment within the week;

That on January 25, 1978, at about 11:00 A.M., your affiant did go to the Hilo Airport Post Office and inquired with Supervisor-in-charge, Mrs. MAILE MATTOS, whether or not she had a mail box rented to a person named STEVE McCULLY who had a previous post office box at KTA and since closed the post office box at KTA and has rented a mail box at the Hilo Airport Post Office, that Mrs. MATTOS checked her records and found that there was a person named STEVE McCULLY whose prior post office box was P.O. Box KTA 3616, Hilo, Hawaii, and who presently rents Post Office Box 4461;

That your affiant requested Mrs. MATTOS

a stop be placed on the Post Office Box 4461 for a package from San Diego addressed to a STEVE McCULLY;

That on February 2, 1978, at 11:15 a.m., your affiant received a telephone call from Mrs. MATTOS of a package which arrived for STEVE McCULLY;

That on February 2, 1978, at about 11:45 a.m., your affiant went to the Hilo Airport Post Office and examined and photographed the above-described package; that the description listed in this affidavit of the said package was obtained from the package within the Hilo Airport Post Office;

That your affiant has attended classes conducted by the Honolulu Police Department and the Drug Enforcement Administration in the identification and investigation of drugs and narcotics; that your affiant has personally participated in several arrests of persons for narcotics

violations within the County of Hawaii in his capacity as a viceman; that your affiant is familiar with some of the street terms used in the drug culture and that the word "speed" on the streets is referred to Methamphatamine.

APPENDIX D

IN THE CIRCUIT COURT OF

THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	
	)	CR. NO. 5580
vs.	)	
	)	PROPOSED FINDINGS OF
DEAN GANA,	)	FACT AND CONCLUSIONS
	)	OF LAW
Defendant.	)	
	)	

The above-entitled matter cam before the above-entitled court, for a hearing on a motion to suppress evidence in the instant cause, the HONORABLE SHUNICHI KIMURA, Judge Presiding. Attorney Charles L. Goldberg appeared for defendant DEAN GANA. John R. Ono, Prosecuting Attorney, by Douglas L. Halsted, First Deputy Prosecuting Attorney, appeared for the State of Hawaii. The court having received evidence, heard testimony, read, and considered the motion for suppres-

sion of evidence and points and authorities in support thereof, including supplemental authorities submitted by the defendant through his attorney, as well as the points and authorities submitted by the State of Hawaii through its attorneys, does hereby make the following findings of fact:

1. On February 2, 1978, John R. De Sa, a police sergeant employed by the County of Hawaii, appeared before the HONORABLE MARK FORMAN OLDS, District Court Judge for the State of Hawaii, for the purpose of obtaining search warrant authorization to search and seize a package in the U. S. Mail located at the Hilo Airport Post Office.

2. De Sa represented in his affidavit in support of his request for a search warrant, that the had received information from a "reliable confidential

informant," that a person known as Steve McCully was expecting a "shipment" within the week from San Diego through the mail.

3. On January 25, 1978, prior to the request for the search warrant, Sergeant De Sa had contacted Mrs. Maile Mattos, supervisor in charge of the Hilo Airport Post Office, concerning whether or not a post office box had been registered to a Steve McCully. Mrs. Mattos informed De Sa of the existence of a post office box at said airport post office in the name of Steve McCully. At that time, Sergeant De Sa requested that Mrs. Mattos place a stop on said post office box for a package from San Diego addressed to Steve McCully, and to contact him upon the arrival of said package.

4. On or about February 2, 1978, Mrs. Mattos telephoned Sergeant De Sa

and informed him that a package had arrived for McCully from San Diego, California, and that earlier in the day on February 2, 1978, McCully attempted to pick up said package by presenting a parcel notification card at the post office counter. Pursuant to De Sa's instructions not to deliver the package to McCully, McCully was advised that said card had been placed in his box by error, and the package was not tendered to McCully.

5. When Sergeant De Sa arrived at the airport post office on February 2, he seized the package, examined it, measured it, photographed it, and copied down the outside writing on said package, and asked to take it but was told that he would have to get a search warrant. He then returned it to the custody of the Postal Service.

6. On February 2, 1978, an affidavit in support of a search warrant was prepared by First Deputy Prosecuting Attorney

Douglas L. Halsted (as testified to by Sergeant De Sa at the hearing in this matter), for the aforementioned package at the Hilo Airport Post Office.

7. The above-mentioned affidavit in support of a search warrant was presented to the HONORABLE MARK NORMAN OLDS, District Court Judge, for the State of Hawaii, and in his sole capacity as a District Court Judge for the State of Hawaii, Judge Olds issued a search warrant for the above-mentioned package at the Hilo Airport Post Office on February 2, 1978.

8. Having obtained said search warrant from Judge Olds, Sergeant De Sa proceeded to the Hilo Airport Post Office and served the search warrant upon Mr. Arthur Aiwohi, postmaster.

9. Sergeant De Sa took custody of the above-mentioned package and returned with it to the Hilo Police Station.

10. At approximately 5:50 p.m., on February 2, 1978, the above-mentioned package was opened.

11. The contents of said package was removed, tested, and altered.

12. On February 6, 1978, the package was rewrapped and returned to the post office by Sergeant Miyashiro.

13. Later in the day on February 6, 1978, an unidentified male was observed to pick up said package from the post office box in question.

14. Said unidentified male was surveilled to 204 Silva Street, where he was arrested by Sergeant Miyashiro.

15. As a direct result of the aforementioned events, the additional search warrants were obtained and searches were conducted of persons, vehicles, residences, and businesses.

Additionally, the court having re-

ceived, read, and considered the motion for suppression of evidence and points and authorities submitted by the State of Hawaii, through its attorneys, and based on the above enumerated findings of fact, does hereby make the following conclusions of law in the instant cause:

1. The state search warrant issued in the instant cause by the HONOPABLE MARK NORMAN OLDS, District Court Judge for the State of Hawaii, for the search and seizure of a package located in the custody of the United States Postal Service at the Hilo Airport Post Office was invalid as a federal search warrant was required.

2. The remaining state search warrants issued in the instant cause were invalid as tainted by the primary illegality of the invalid state search warrant issued for the search and seizure of a package in the custody of the United States Postal Service at the Hilo Airport Post

Office.

3. The Postal Regulation violations in the instant cause do not call for the suppression of evidence.

4. The information presented in the affidavit in support of the search warrant for the package in the custody of the United States Postal Service at the Hilo Airport Post Office was not stale, and probable cause existed.

DATED: July 25, 1979

/s/
SHUNICHI KIMURA,
JUDGE

APPROVED AS TO FORM:

/s/
CHARLRES L. GOLDBERG
Attorney for Defendant
DEAN GANA

/s/
JEFFREY CHOI
Attorney for Defendant
DEAN GANA

DOUGLAS L. HALSTED
First Deputy Prosecuting
Attorney

APPENDIX E

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 5580
vs.	)	ORDER
DEAN GANA,	)	
Defendant.	)	

The above-entitled matter came before the above-entitled court, for a hearing on a motion tc suppress evidence in the instant cause, the HONORABLE SHUNICHI KIMURA, Judge Presiding. Attorney Charles L. Goldberg a-peared for defendant DEAN GANA. John R. Ono, Prosecuting Attorney, by Douglas L. Halsted, First Deputy Prosecuting Attorney, appeared for the State of Hawaii. The court having received, read, and considered the motion for suppression of evidence and points and authorities in

support thereof submitted by the defendant through his attorney, as well as the points and authorities submitted by the State of Hawaii through its attorney;

WHEREFORE, pursuant to the foregoing, and for good cause appearing,

IT IS HEREBY ORDERED that the evidence seized in the instant cause be suppressed since the state issued search warrant in the instant cause was invalid as a federal search warrant was required.

IT IS SO ORDERED:

DATED: _____ /s/ Shunichi Kimura

APPENDIX F

UNITED STATES POSTAL SERVICE
Office of the Inspector in Charge
San Francisco, CA 94101

Date: June 15, 1977

Subject: State Search and Seizure Warrants Against Mail

All Inspectors
San Francisco Division

DIVISION CIRCULAR NO. 14

The USPS Law Department is currently reviewing the question of whether a State search warrant issued under the authority of State law may lawfully authorize the interception, detention, and opening of matter in the U.S. Mail before its delivery to the person addressed. It is their current opinion that a State search and seizure warrant may not lawfully authorize such mail interception, detention and opening.

Prior to implementing a Postal Service wide policy not to honor service of State

search and seizure warrants, the Law Department intends to publish a notice of proposed rule making in the Federal Register. This will be followed by notice in the Postal Bulletin and appropriate advice to all State Attorneys General as well as to the Department of Justice.

Until such time as the Law Department has completed its actions, Inspectors should be guided by the following instructions: in Inspection Service cases, mail in the custody of the Postal Service may only be searched, seized, detained, intercepted or opened on the basis of a Federal search and seizure warrant issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure. It should be pointed out that Rule 41(a) provides:

"A search warrant authorized by this Rule may be issued by a Federal Magistrate or a judge of a State Court of Record within the District wherein the property is located, upon request

of a Federal law enforcement officer. . ."

Inquiries received by Inspectors from either Postmasters or other law enforcement agencies dealing with requests to search, seize, etc. mail in custody of the Postal Service on the basis of a State search warrant should be referred promptly to Division Headquarters, Attention: AIC J.S. Williamson, Security.

In the event a Postmaster reports to an inspector that he has been served with a State search warrant, he should be instructed to defer surrender of the mail pending advice from Division Headquarters. In such matters necessitating speedy resolution of the legal issues, it is important we promptly receive all information in order that the issue can be handled via telephone with the Chief Inspector's Office.

B.M. McCLANAHAN
Inspector in Charge
San Francisco, CA 94101

APPENDIX G

CHIEF POSTAL INSPECTOR
Washington, DC 20260

December 1, 1976

PERSONAL ATTENTION

Regional Chief Inspectors
All Regions

Inspectors in Charge
All Divisions

STATE SEARCH AND SEIZURE WARRANTS AGAINST MAIL

The USPS Law Department is currently reviewing the question of whether a State search warrant issued under the authority of State law may lawfully authorize the interception, detention, and opening of matter in the U.S. Mail before its delivery to the person addressed. It is their current opinion that a State search and seizure warrant may not lawfully authorize such mail interception, detention, and opening.

Prior to implementing a Postal Service wide policy not to honor service of State search and seizure warrants, the Law De-

partment intends to publish a notice of proposed rule making in the Federal Register. This will be followed by notice in the Postal Bulletin and appropriate advice to all State Attorneys General as well as to the Department of Justice.

Until such time as the Law Department has completed its actions as mentioned above, Inspectors should be instructed that in Inspection Service cases mail in custody of the Postal Service may only be searched, seized, detained, intercepted or opened on the basis of a Federal search and seizure warrant issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure. It should be pointed out that Rule 41(a) provides:

"A search warrant authorized by this Rule may be issued by a Federal Magistrate or a judge of a State Court of Record within the District wherein the property is located, upon request of a Federal

law enforcement officer . . ."

Inquiries received by the Inspection Service from either Postmasters or other law enforcement agencies dealing with requests to search, seize, etc., mail in custody of the Postal Service on the basis of a State search warrant should be referred through channels to this Headquarters, Attention: Assistant Chief Inspector, Office of Security, Legal Liaison Branch. In the event a Postmaster reports to the Inspection Service that he has been served with a State search warrant, he should be instructed to defer surrender of the mail pending advice which we will seek from the General Counsel. Under those conditions all available information should be brought to the attention of the above designated official by telephone to permit speedy resolution of the legal issues presented by the particular circumstances of the case.

You will be promptly advised of fur-

ther developments on this topic as they occur.

C. Neil Benson /s/

Chief Inspector

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. 81-2182

DEAN GANA, PETITIONER

v.

STATE OF HAWAII

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON R. ONO
Prosecuting Attorney
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Attorney for
State of Hawaii,
Respondent.
(808) 961-8246

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 81-2182

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STATE OF HAWAII

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Defendant-Appellee ("Petitioner") DEAN GANA submitted to this Court a petition for a writ of certiorari from the adverse decision in the case of State of Hawaii, Plaintiffi-Appellant v. Stephen G. McCully[1] and

---

[1] Stephen G. McCully was a co-defendant and co-appellant, but is not petitioning for a writ of certiorari.

Dean Gana, Defendants-Appellees of the Hawaii Supreme Court, 642 P.2d 933, ____ Haw. ____ (No. 7759, March 24, 1982) (Petitioner's Appendix A)

In prosecution for drug offenses, Third Circuit Court Judge Shunichi Kimura, prior to trial, granted Defendant's motion for suppression of the evidence obtained by the Police Department of the County of Hawaii upon search of first class United States mail parcel. The search was made pursuant to search warrant issued by Mark Norman Olds, District Judge of the Third Circuit of the State of Hawaii, and served on Arthur Aiwohi, postmaster of Hilo Airport Post Office.

Judge Kimura granted the motion for suppression concluding that the State search warrant issued for the search and seizure of a package located in the custody of the United States Postal Service at the Hilo Airport Post Office was invalid as a federal search warrant was required. (Petitioner's Appendix D at p. 33a.)

The Hawaii Supreme Court's opinion states the pertinent facts for considering this petition. State v. McCully, 642 P.2d 933, 936-38 (1982). (Petitioner's Appendix A, pp. 9a - 19a). The facts that are referred to in the opinion were in the record on appeal.

The facts indicate the police cooperated with the postal authorities. The Honolulu postal inspector in advising police on proper procedures did not state that a federal warrant was required. In fact, the State search warrant was accepted by the Hilo Postmaster. Furthermore, Steve Ovelgonne, a postal inspector in Honolulu, testified that on February 2, 1978, and prior thereto, post offices in California honored State search warrants. In addition, Ovelgonne testified that the police were not required to secure a federal search warrant because, at that time, the law department of Postal Service had stated that new instructions were forthcoming, but they were not

issued until after February 2, 1978.

II. QUESTION PRESENTED

Whether a state search warrant, issued for the investigation of a state criminal offense, is valid, when served on a postal official at a United States Post Office for the search and seizure of a mail parcel.

III. REASONS FOR DISALLOWANCE OF THE WRIT.

A. This court lacks jurisdiction.

B. The allegedly "conflicting" decision relied upon by petitioner is distinguishable on its facts and on the law.

C. A review by this court would involve a review of complex set of facts and for various reasons this case is not likely to recur.

IV. ARGUMENT

A. This court lacks jurisdiction.

The petitioner claims jurisdiction pursuant to United States Code Title 28, §1257(3), which states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute

> of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In Bateman v. Arizona, 429 U.S. 1306, 97 S.Ct. 1, 50 L.Ed.2d (1976) (Rehnquist, J., in chambers). Mr. Justice Rehnquist held that this "Court is precluded from taking cases unless the petition is from a 'final judgment' within the meaning of 28 U.S.C. §1257. In a criminal case, the 'final judgment' is, of course, the imposition of a sentence. Parr v. United States, 351 U.S. 513, 518, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956); Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 165. 82 L.Ed. 204 (1937)."

This court lacks jurisdiction since the case has not gone to trial. The judgment of the Hawaii Supreme Court does not terminate

the litigation between the parties but in fact allows the State to proceed with the prosecution of defendants who are charged with wholly state offenses. There is clearly no final judgment from which this court may review.

Furthermore, it has been held that generally, the state can exercise jurisdiction over acts committed within its physical boundaries. However, it is also established that certain exceptions to this rule exists. In short, the federal government can exercise exclusive jurisdiction within a state by the "pre-emption of the State's power by either constitutional provision or by clear and unambiguous federal legislation, reserving that subject area or land area to federal control exclusively," People v. Mitchell, 90 Misc. 2d 463, 395 N.Y.S.2d 340 at 341 (1977), or by the cession of land and jurisdiction exclusively to the federal government. See, Art. I § 8 cl. 17, Constitution of the United States of America.

It is clear that the State of Hawaii is a sovereign entity which has retained its police power notwithstanding its admission into the United States of America. See §§ 1, 12, 15, and 16 of the Admissions Act (Pub. L. 86-3, 73 Stat. 4, March 18, 1959). See also Article I of the Constitution of the State of Hawaii.

It is equally clear that pursuant to this retained police power, the State may regulate the use of controlled substances within its borders. State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975), and State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972).

Here, Defendants are charged with state offenses. Defendant Gana is charged with Attempted Promoting of a Dangerous Drug, and Defendant McCully with Attempted Promoting, and Promoting of a Dangerous Drug and Promoting a Detrimental Drug. These offenses constitute acts that the state legislature has deemed punishable by law.

Beyond this naked constitutional question, it is evident that based on a consideration of the Hawaii Constitution, Hawaii Statutes, and court rules governing search warrants, that Judge Olds acted within his authority to issue a valid warrant. See Article I, §§ 5-6 of the Constitution of the State of Hawaii; Chapter 803, H.R.S.; Sections 705-500, 712-1241, and 712-1242, H.R.S.; Chapter 604, H.R.S., and Rule 41 of the Hawaii Rules of Penal Procedure.

The applicable statutory and rule sections on February 2, 1978, did not prevent the service of a state warrant.

State submits that the State of Hawaii has jurisdiction to regulate the possession, sale, or use of controlled substances within the state. That even in light of the postal clause, Article I, Section 8, of the Constitution of the United States and Title 39, the State of Hawaii was not pre-empted from the search for and seizure of illicit drugs pursuant to its police powers.

The State submits that due respect for the principles of comity necessitates a denial of certiorari in order to allow the State to proceed with the timely prosecution of defendants for the state drug offenses. Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

B. The allegedly "conflicting" decision relied upon by petitioner is distinguishable on its facts and on the law.

The petitioner only found one example of a conflict with the decision of the Hawaii Supreme Court. the petitioner relies on Ex Parte Phoedivius, 177 C.238, 170 P.412 (1918), where it was held that a California statute prohibiting the shipping by parcel post of wild game did not unlawfully interfere with interstate commerce, even though game could be lawfully shipped out of the state if other means of transportation were used. However, the court never held that a state court does not have authority to issue

a state search warrant for the search and seizure of the United States mail. The court did note that:

> When game is deposited in the parcel post it is at once subject to the exclusive control of the postal authorities under the statutes of the United States and regulations of the Post Office Department, and absolutely free from state inspection and control.

The case does not address itself to the issue of whether a state search warrant is invalid within the meaning of 39 U.S.C. 3623(d). Furthermore, the facts in the present case indicate that the postal authorities directed the police officers to secure a warrant which the officers presented to the authorities prior to the search and seizure of the evidence.

The State submits that the case cited by petitioner is consistent with the position of the Hawaii Supreme Court because on February 2, 1978, the date the warrant was issued by the State (Judge Olds), first class mail was free from State inspection and

control except under authority of search warrant authorized by law pursuant to United States Code, Title 39, §3623(d). It must be emphasized that there were no federal cases, statute, or regulations on February 2, 1978, that prohibited the use of the state search warrant.

The Hawaii Supreme Court reasoned that the "validity of a search warrant is determined as of the date it is issued and executed, United States v. Doe, 19 F.R.D. 1 (D.C.E.D. Tenn. 1956)." State v. McCully, 642 P.2d 933, 937 (1982).

Therefore, the court rejected the postal regulations cited by petitioner that were not in existence when the police obtained the search warrant pursuant to the instructions of the local postal authorities.

The State submits that a review of the allegedly "conflicting" decision reveals that the cases are distinguishable on the facts and on the law.

C. A review by this Court would involve a review of complex set of facts and for various reasons this case is not likely to recur.

The Hawaii Supreme Court opinion is accurate and correct. The court reviewed the entire record and took note of the totality of circumstances regarding the conduct of the police and postal authorities.

The carefully reasoned, unanimous opinion of the court recognized that there existed no statute or regulation that prohibited the issuance of the warrant on February 2, 1978.

However, in holding that the state search warrant was valid for search and seizure of the first class mail, the court did recognize that postal regulations effective on May 5, 1978, directed federal postal authorities to honor only federal warrants.

In light of this, it is unlikely that postal authorities will recognize state

warrants. In any event, there can be no standing to raise the issue of alleged violations of the Postal Regulations as a basis of suppressing a validly issued search warrant. Warren v. United States, 183 Fed. 718 (8th Cir. 1910).

In addition, it must be stressed that in the present case, the police sought the advice of the postal authorities on the proper search warrant procedures. There was no willful attempt on the part of the government agents to circumvent or disregard the law. Indeed, the law at the time only required that no first-class mail of domestic origin be opened except under authority of search warrant authorized by law.

Considering the conduct of the police officers and postal authorities, the applicable law on the date the search warrant was issued, and the postal regulation subsequently adopted, it is obvious that the issue in the present case is unlikely to

recur and is too narrow to warrant review by this court on certiorari.

V. CONCLUSION

In the realm of factual review and analysis, the rulings of the highest courts of the states are treated with and entitled to great weight. The present case, Petitioner raises questions turning entirely on the facts of this case, already resolved in favor of respondent, and without any impact outside the limits of this case.

Finally, this court lacks jurisdiction because of the lack of finality, therefore, certiorari should be denied.

DATED: AUG 30 1982

Respectfully submitted,

JON R. ONO
Prosecuting Attorney

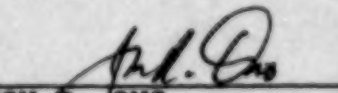
Attorney for State of Hawaii

CERTIFICATE OF SERVICE

I, Jon R. Ono, hereby certify that on this 30th day of August, 1982, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, airmail postage prepaid, to the following counsel:

CHARLES L. GOLDBERG, ESQ.
303 West "A" Street
San Diego California 92101

Attorney for Petitioner.



JON R. ONO
Prosecuting Attorney
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Attorney for State of Hawaii,
Respondent.